READING BETWEEN THE (BLOOD) LINES

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I. INTRODUCTION

Legal scholars and historians have recognized the rule of hypodescent—that "one drop" of African blood categorized one as Black[1]—as one of the powerful tools that law and society deployed to construct racial identities and deny equal citizenship.[2] Indeed, at least one prominent scholar has suggested that the concept of hypodescent operated as the most determinative method of ascertaining racial identity.[3] Formalistic in its application, the hypodescent rule ensured "[t]hat even Blacks who did not look Black were kept in their place."[4]

Ariela J. Gross's new book, *What Blood Won't Tell: A History of Race on Trial in America*,[5] boldly complicates the dominant narrative about

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1. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 26–27 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1738 (1993). This Book Review Essay prefers to capitalize the word "Black" because the term refers to a particular cultural group that "require[s] denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

2. *See* Gotanda, *supra* note 1, at 26–27; Harris, *supra* note 1, at 1738.

3. *See* Harris, *supra* note 1, at 1739–40.

4. *Id*. at 1740 (quoting Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 281 (1983)).

5. ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA

hypodescent rules in legal scholarship. On the one hand, *What Blood Won't Tell* argues that the legal and social construction of race was far more complex, flexible, and subject to manipulation than the scholarship regarding the rules about blood distinctions has suggested.[6] Using racial identity trials and local records as sites for examining the legal production of race, *What Blood Won't Tell* exposes the various methods that local citizens deployed to define race. "Common sense,"[7] "race performance,"[8] and "race by association"[9] were among the informal and subjective factors that ignored the formalism of blood rules in the prescription of racial identity. Thus, contrary to the general view that blood always determined race, *What Blood Won't Tell* illustrates how people were "raced" despite their blood—leading Gross to boldly state that "we have made too much of the 'hypodescent' rule."[10]

On the other hand, *What Blood Won't Tell* highlights circumstances, both historically and in recent memory, of the ways in which blood distinctions did play a crucial role in shaping the identity of people of color, including indigenous peoples. Blood quantum requirements facilitated not only the racial subordination of indigenous peoples, but also contributed to the colonization of their lands. As chapters 5 and 6 reveal, the federal government imposed blood quantum rules in the late 1880s and 1920s on American Indian tribes and native Hawaiians[11] as part of a policy of replacing these indigenous peoples' land ownership systems with the Western system of private property ownership.[12] The use of blood quantum requirements led to the rejection of indigenous peoples' sovereignty—restricting their ability to acquire and alienate property[13] and facilitating significant transfers of indigenous-owned lands to nonindigenous populations.[14]

Importantly, *What Blood Won't Tell* also examines how blood quantum rules relate to contemporary efforts to reassert indigenous peoples' sovereignty and claims to lands. As *What Blood Won't Tell*

(2008).

6. *See id*. at 297–98.

7. *See id*. at 16–47 (chapter 1).

8. *See id*. at 48–72 (chapter 2).

9. *See id*. at 73–110 (chapter 3).

10. *Id*. at 297.

11. It should be noted that other parts of the book also examine the racialization of indigenous peoples through blood quantum laws and other means. *See, e.g.*, *id*. at 43, 69, 101, 124, 136.

12. *See id*. at 153–68 (examining the American Indian allotment program); *id*. at 182–202 (discussing the native Hawaiian allotment process).

13. *See id*. at 153–68, 182–202.

14. *See id*.

explains, some of these efforts are controversial and have incited intense criticism. The Seminole and Cherokee nations, for example, have implemented blood quantum requirements to not only determine membership, but also to expel Black Indian freedmen from tribal membership.[15] Ironically, the means by which indigenous peoples became racially subordinated—blood quantum—has become a method of expressing sovereignty. These historical and contemporary discussions of the link between blood rules, racism, and sovereignty illuminate a marginalized perspective of the legal and social construction of race in the United States. Further, they offer an opportunity to revisit the use of blood quantum rules within indigenous communities as methods of expressing sovereignty and the right to self-determination.

This Review highlights the important contributions of *What Blood Won't Tell* to our understanding of the racial experience of indigenous peoples and the contemporary methods used to remedy the present-day effects of indigenous peoples' colonial experience. *What Blood Won't Tell* advances a robust account of the racialization of people of color through rules about blood differences in three distinct ways. First, it places the colonial experience of indigenous peoples within the larger historical contexts of racial subordination and efforts to promote White domination and privilege. Second, it underscores the federal government's ongoing responsibility to counteract the long-lasting effects of its past misdeeds by addressing indigenous peoples' unresolved claims to lands that have been stolen from them. Third, it allows us to take a careful look at the relationship between blood quantum rules and the right of indigenous peoples to exercise self-determination. Taken together, these three perspectives reveal the immense challenges inherent to remedying the long-term effects of the racialization and colonization of indigenous peoples. Most importantly, they point to the need to reexamine the role of law in promoting indigenous peoples' right of self-determination and consider what limits, if any, may be placed on the exercise of this vital right.

This Review proceeds in three parts. Part II contextualizes the arguments presented here by considering the relationship between blood quantum and racial discrimination. The perceived inferiority of indigenous blood and superiority of White blood was implicit in the federal

15. *See id*. at 169–77 (discussing the exclusion of Black Indian freedmen from the Seminole and Cherokee nations). *See also* S. E. Ruckman, *Freedman Discussed at Federal Bar Association Meeting*, INDIAN COUNTRY TODAY, Sept. 27, 2009, http://www.indiancountrytoday.com/archive/61480202.html (reporting a panel presentation that discussed the exclusion of freedmen descendents from the Cherokee Nation).

government's implementation of blood quantum requirements when allotting lands to individual members of American Indian tribes and native Hawaiians. This history of racial hierarchy and denial of equal citizenship provides an important context for evaluating the historical and contemporary use of blood quantum today.

Part III focuses on *What Blood Won't Tell*'s examination of the role that blood quantum played in the racial subordination of indigenous peoples and the loss of their lands. In narrating this history, *What Blood Won't Tell* emphasizes how blood quantum rules led to property being transferred from indigenous peoples to White citizens.[16] By telling their timely story, *What Blood Won't Tell* points to the need to address indigenous peoples' ongoing demands for sovereignty and property that they lost. Indeed, the recent Supreme Court opinion in *Hawaii v. Office of Hawaiian Affairs*,[17] which rejected native Hawaiians' contentions that they retained ownership of lands that were taken during the overthrow of their monarchy,[18] further emphasizes the continuing painful story of the loss of nationhood and property that require immediate attention.

Although this Review applauds *What Blood Won't Tell*'s significant contributions to our understanding of race and indigeneity, Part IV contends that the book's stance against the contemporary uses of blood quantum rules within indigenous communities demands critical evaluation. *What Blood Won't Tell* has a negative view—rightly so—of the use of blood quantum as a method of expressing sovereignty and self-determination.[19] The overt exclusion of Black Indian freedmen from the Cherokee and Seminole nations illustrates why law and society should be concerned by, if not hostile to, blood quantum restrictions. As this part illustrates, however, not all indigenous groups use blood quantum rules in a racially discriminatory manner. An example of such a benign use of blood quantum may be found in the Commonwealth of the Northern Mariana Islands ("CNMI"), a U.S. territory. The CNMI restricts ownership of land to "persons of Northern Marianas descent," which it defines, in part, as persons who are at least "one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood."[20] As this part argues, the text and

16. *See* GROSS, *supra* note 5, at 153–68, 182–202.

17. Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

18. *See id*. at 1445–46.

19. *See* GROSS, *supra* note 5, at 210.

20. N. MAR. I. CONST. art. XII, § 4, *available at* http://cnmilaw.org/constitution_article12.htm. I have previously examined Article XII of the CNMI constitution, but in a different context. *See* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008) (contending that blood quantum land laws in the U.S. territories promote the

legislative history of Article XII of the CNMI constitution, as well as the most recent CNMI Supreme Court opinion interpreting it,[21] demonstrate that Article XII privileges indigenous peoples without discriminating on the basis of race. Article XII's political, nonracial nature offers an alternative perspective on blood quantum rules, thus tempering *What Blood Won't Tell*'s suspicions toward blood quantum.

II. BLOOD QUANTUM LAWS AND WHITE PRIVILEGE

What Blood Won't Tell explains that through the equation of "blood" with race, both hypodescent and blood quantum rules assigned and reinforced inferior racial identities on various groups. Hypodescent and blood quantum rules differed, however, in their methodological approach. The "one drop" hypodescent concept held that any trace of African blood rendered one Black,[22] whereas the blood quantum rules categorized American Indians to a particular "race"—Black, White, or Indian—based on the racial *percentage* of their blood.[23] That is, the higher the fractionated blood of a particular "race," the greater the likelihood of being assigned that specific racial identity.

Despite their operational differences, blood quantum rules and the "one-drop" rule functioned essentially in the same way. Both rules supported and reified the superiority of "White blood."[24] As Neil Gotanda commented almost twenty years ago, the rule of "hypodescent impose[d] racial subordination through its implied validation of white racial purity."[25] Similarly, blood quantum rules promoted White racial domination by assigning an inferior status to the blood of indigenous peoples and denying them equal citizenship.[26]

In *Jeffries v. Ankeny*, for example, the court held that the plaintiff, a person who was three-fourths White and one-fourth Indian, was wrongly denied the right of suffrage.[27] The court reasoned that those who were "nearer white than black, or of the grade between mulattoes and the whites, were entitled to enjoy every political and social privilege of the white

territorial peoples' right to self-determination). This Review expands on this earlier work by arguing that Article XII does not discriminate on the basis of race.

21. *In re* Estate of Tudela, 2009 MP 9, *available at* http://www.cnmilaw.org/pdf/supreme_court/2009-MP-09.pdf.

22. *See* Harris, *supra* note 1, at 1739–40.

23. *See* GROSS, *supra* note 5, at 10–14.

24. *Id*. at 100.

25. Gotanda, *supra* note 1, at 26.

26. *See* GROSS, *supra* note 5, at 10–14.

27. *See* Jeffries v. Ankeny, 11 Ohio 372, 375 (1842).

citizen."[28] As a person with three-fourths White blood, the plaintiff was more White than Indian and thus entitled to the privileges of whiteness, including full membership in the U.S. polity. This holding not only elevated him to the more superior White race, but also simultaneously reaffirmed the status of American Indians and African Americans as inferior racial groups.

The relationship between fractionated indigenous blood and formal citizenship became particularly evident in the naturalization context. Prior to 1924, when Congress conferred U.S. citizenship by statute to American Indian members,[29] the right to naturalize was available to only white persons and those of African ancestry.[30] A number of individuals applied for naturalization on grounds that they were White,[31] including a Canadian Indian whose father was White.[32] The concept of fractionated blood figured prominently in these cases. Indeed, in *In re Camille*, the court took the "nearer white than black" concept literally when it rejected an Indian's claim to Whiteness because he was only 50 percent White.[33] Thus, the court held that a part-Indian noncitizen applying for naturalization must possess *more* than 50 percent White blood in order to be considered White and obtain citizenship.[34]

In a rare case when a noncitizen invoked Blackness to claim U.S. citizenship,[35] an Indian from British Columbia unsuccessfully argued for the right to naturalize based on his part-African ancestry. Specifically, in *In re Cruz*, the court concluded that an Indian with one-quarter African ancestry was not Black and thus not entitled to citizenship.[36] The court

28. *Id*.

29. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253. The Supreme Court had previously ruled that American Indians are not citizens under the Fourteenth Amendment Citizenship Clause if they are born on tribal land. *See* Elk v. Wilkins, 112 U.S. 94, 101–02 (1884).

30. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

31. *See* GROSS, *supra* note 5, at 211–93 (chapters 7 and 8) (discussing petitions for naturalization from, among others, Asian immigrants and Mexican Americans).

32. *See In re* Camille, 6 F. 256, 256–57 (D. Or. 1880).

33. *Id*. at 258–59.

34. *See id*.

35. *Cf*., *e.g*., United States v. Thind, 261 U.S. 204, 207 (1923) (presenting the claim of a South Asian Indian who contended that he was White and thus eligible for citizenship); Ozawa v. United States, 260 U.S. 178, 192 (1922) (presenting the claim of a Japanese noncitizen who argued he was White and thus eligible for citizenship); GROSS, *supra* note 5, at 211–93 (discussing attempts made by noncitizens to obtain citizenships by making claims to Whiteness); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 56–77 (2006) (analyzing the *Thind* and *Ozawa* cases); Devon W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633, 686–91 (2009) (offering critical analysis of the *Thind* and *Ozawa* cases).

36. *See In re* Cruz, 23 F. Supp. 774, 775 (E.D.N.Y. 1938).

explained that "for a petitioner to qualify under the [citizenship] statute, his African descent must be shown to be at least an affirmative quantity, and not a neutral thing as is the case of the half blood, or a negative one as in the case of the one-quarter blood."[37] As in *Camille*, being a fraction of an eligible race—White or Black—was inadequate. One needed to establish a closer proximity to either Whiteness or Blackness in order to gain citizenship.

In sum, these cases demonstrate the clear connection between the implementation of blood distinctions and the prescription of an inferior racial identity. As stressed throughout this Review, understanding the legacy of this history is critical for examining not only the unique impact of blood quantum rules on indigenous peoples' land rights, but also for contemporary efforts to address these ongoing land claims.

III. BLOOD QUANTUM, RACE, AND LOSS OF INDIGENOUS PEOPLES' LANDS

> you're standing in the
> blood quantum line
> with a pitcher in your hand
> poured from your heart
> into your veins
> you said I am
> i am
> i am
> now measure me
> measure me
> tell me where I stand
> allocate my very soul
> like you have my land
>
> —Indigo Girls
> "Blood Quantum," on *Honor: A Benefit for the Honor of the Earth*

The foregoing lyrics to the Indigo Girls' song, *Blood Quantum*, reflect a theme that *What Blood Won't Tell* makes clear—that, for many, blood quantum rules equated with the involuntary assignment of identity and the loss of indigenous peoples' lands.[38] As *What Blood Won't Tell* reveals, the loss of indigenous property occurred in large part because of the deployment of blood quantum rules. Specifically, the federal government

37. *Id*. at 775.
38. *See* GROSS, *supra* note 5, at 140–210 (chapters 5 and 6).

conferred blood quantum distinctions on American Indian tribes and native Hawaiians for the purpose of dividing up their lands and, at least in theory, conferring lands to individual members of these groups.[39] However, as the following summary of some key points from *What Blood Won't Tell* shows, the utilization of blood quantum resulted in many indigenous peoples becoming landless. Against this history lies the significant reality of the federal government's ongoing obligation to redress the loss of indigenous peoples' lands.

A. AMERICAN INDIANS AND PROPERTY RIGHTS

For American Indian tribes, the pernicious purpose and effect of blood quantum rules began with the Dawes Allotment Act of 1887.[40] The Dawes Allotment Act implemented a federal policy of dividing Indian reservations into plots of land and allotting them to individual Indians.[41] The underlying principle of this policy was to break up Indian tribes by disestablishing their governments.[42] Individual allotment depended on tribal membership, which in turn relied on an enrollment process that, from the beginning, aimed to distinguish those Indians with "true" Indian blood ("Indian by blood") from those Indians with Black ancestry ("freedmen").

The introduction of blood quantum was crucial. As explained in *What Blood Won't Tell*, the tribal enrollment process eviscerated the former acknowledgment of American Indians as both a racial group and members of independent nations.[43] In particular, the process turned them into racialized individuals and "incorporat[ed] them into a Jim Crow racial order."[44] Moreover, the separation of Indians by blood from the "freedmen" laid the foundation for many years of legal and social conflicts over whether Black Indians could be considered authentic members of Indian nations. As *What Blood Won't Tell* reveals, the determination of who was considered a freedman and who was an Indian by blood was inconsistent at best and completely arbitrary at worst.[45]

The enrollment and allotment processes led to restrictions on ownership of land. Indians who were considered to be "more than one-half Indian" could not alienate their property whereas "half bloods" and

39. *Id*.
40. *See id*. at 141 (discussing the Dawes Allotment Act of 1887, ch. 119, 24 Stat. 388).
41. *Id*.
42. *Id*.
43. *See id*.
44. *Id*.
45. *See id*. at 165–68.

freedmen could.[46] Buttressing this policy was the racialized belief that the more Indian blood one possessed, the less competent one would be in land transactions.[47] The overall result of the allotment of lands was that "most Indians lost their allotted lands within a brief span of years to sales, fraud, and graft."[48]

B. NATIVE HAWAIIANS

Similar to its treatment of American Indians, the federal government imposed blood quantum rules on native Hawaiians for the purpose of allotting their lands. At the outset, the situation of native Hawaiians differed from American Indians in a number of ways. One significant difference was that the United States did not have an indigenous governing entity to abolish when it sought to allot lands to native Hawaiians in the twentieth century. Unfortunately for native Hawaiians, the United States helped overthrow their monarchy in 1893,[49] annexed the territory in 1898,[50] and made it a U.S. territory in 1900.[51] Thus, by 1921 when Congress passed the Hawaiian Homes Commission Act ("HHCA")[52] to establish an allotment program in Hawaii, Hawaii had already been colonized by the United States for over twenty years.

Similar to American Indians, native Hawaiians lost much of their land through the introduction of blood quantum distinctions. The HHCA set aside 200,000 acres of lands for the alleged purpose of "rehabilitating" native Hawaiians.[53] It defined native Hawaiians as those who could trace their lineage to "one-half of the blood of the races inhabiting the Islands in 1778."[54] Initially drafted to allot lands to those with 1/32 native ancestry, the decision to narrow the HHCA's allotment eligibility to those persons whose ancestors were of "one-half" native Hawaiian blood drastically reduced the number of native Hawaiians who could benefit from the law.[55] The startling numbers cited in *What Blood Won't Tell* are worth repeating

46. *Id*. at 166.
47. *See id*. at 165–66.
48. *Id*. at 141.
49. *See id*. at 181–82.
50. *See id*. at 182.
51. *See id*. at 182–83 (discussing the Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900)).
52. *See id*. at 201–02 (discussing the Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921)).
53. *See id*. at 187–202. Note that these lands were part of the 1.8 million acres that were "ceded" to the United States when Hawaii became a territory. *See id*. at 182–83, 201–02.
54. *Id*. at 202.
55. *Id*.

here:

> [I]n the seventy years following the passage of the HHCA, fewer than 6,000 native Hawai'ians received land leases, 30,000 died while on the waiting list, and 22,000 were still waiting. In addition, nearly 14,000 acres of home lands 'were transferred to other government agencies through 29 Executive Orders although the Governors had no authority to do so,' and other lands were leased, licensed, or otherwise unavailable to homesteading, leaving only 20 percent of the ceded lands that were to have been allotted actually to be homesteaded by native Hawai'ians.[56]

While many native Hawaiians were denied property, many nonindigenous persons obtained significant portions of land.[57] The sugar cane companies, which had dominated Hawaiian economy in the early 1900s, had particular interest in not only renewing their existing leases of public lands, but also obtaining more lands.[58] The one-half blood quantum requirement ultimately opened up more lands for non-native Hawaiians and "gave the sugar companies access to the lands they wanted."[59]

In brief, through blood quantum rules, once independent nations were reduced to groups of racialized individuals for the purpose of subordinating them. As *What Blood Won't Tell* reveals, this insidious deployment of blood quantum had a particularly devastating effect on the property rights of indigenous peoples. By explaining this history, *What Blood Won't Tell* sheds important light on the need to settle indigenous peoples' claims to their lands. At present, there are insufficient laws in place that adequately recognizes indigenous peoples' ownership of lands. The Supreme Court's recent opinion in *Hawaii v. Office of Hawaiian Affairs*[60] illustrates this point.

C. HIGHLIGHTING ONGOING CLAIMS TO INDIGENOUS LANDS

The case of *Hawaii v. Office of Hawaiian Affairs* involved native Hawaiians' claims to lands that were ceded to the United States in 1898 after annexation.[61] Through annexation, the Republic of Hawaii "'cede[d] absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind' and further 'cede[d] and transfer[red] to

56. *Id*.
57. *See id*. at 201–02.
58. *See id*. at 186–87.
59. *Id*. at 202. *See also id*. at 186 (explaining that the "blood quantum limitation directly determined how much land would be available as 'surplus' for the sugar companies and ranches").
60. Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).
61. *Id*. at 1440.

the United States the absolute fee and ownership of all public, Government, or Crown lands.'"[62] The state of Hawaii eventually acquired these lands from the United States in 1959 upon admission to the Union[63] and was required to place the ceded lands into a public trust.[64] The state later created the Office of Hawaiian Affairs ("OHA") to ensure that funds from the use or sale of any ceded lands would benefit native Hawaiians.[65]

Hawaii v. Office of Hawaiian Affairs involved a tract of former Crown lands that had been placed in a trust upon Hawaii's admission to the United States.[66] The state wanted to develop the lands and thus needed to take them out of the trust, which required the state to give the OHA compensation for the property.[67] The OHA, however, refused to accept compensation unless the state agreed to "include a disclaimer preserving any native Hawaiian claims to ownership of lands transferred from the public trust for redevelopment."[68] The OHA relied on a joint resolution ("Apology Resolution") passed by Congress in 1993 that acknowledged and apologized for the "illegal overthrow of the Kingdom of Hawaii."[69] The Apology Resolution stated that the "indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."[70] Relying on this language and other sections of the Apology Resolution,[71] the OHA contended that the state should be enjoined from transferring any of the lands until native Hawaiians' claims to those lands were addressed.[72]

The Hawaii Supreme Court agreed with the OHA[73] only to be

62. *Id*.

63. *See id*. (citing Hawaiian Statehood Admissions Act, Pub. L. No. 86-3, 73 Stat. 4 (1959)).

64. *Id*.

65. *See id*. at 1441.

66. *See id*.

67. *See id*.

68. *Id*.

69. *Id*. at 1440–41 (quoting Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993) [hereinafter Apology Resolution]).

70. *Id*. at 1441 (quoting Apology Resolution, *supra* note 69, at 1512).

71. The Apology Resolution contained thirty-seven "whereas" provisions and five substantive provisions, including statements that Congress acknowledges the "suppression of the inherent sovereignty of the Native Hawaiian people," "recognizes and commends efforts of reconciliation," apologizes for the "overthrow of the Kingdom of Hawaii," and commits "to acknowledge" the ramifications of the overthrow" to provide for "reconciliation between the United States and the Native Hawaiian people." Apology Resolution, *supra* note 69, at 1513.

72. *See Office of Hawaiian Affairs*, 129 S. Ct. at 1441–42.

73. *See id*. at 1442 (citing Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 177 P.3d 884, 928 (Haw. 2008)).

unanimously reversed by the U.S. Supreme Court.[74] Writing for the Court, Justice Alito rejected the claim that the Apology Resolution prohibited Hawaii from alienating public lands "until a determination of the native Hawaiians' claims to the ceded lands is made."[75] The Supreme Court held that the text of the Apology Resolution lacked express language creating substantive rights and that none of the other words in the Apology Resolution could be reasonably construed to have created such rights.[76]

Of particular interest is the last justification against interpreting the Apology Resolution as a law that created substantive rights. Justice Alito wrote that, "the Apology Resolution would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union."[77] This rationale, emphasizing that Congress cannot reserve lands that have already been bestowed to the state, is quite disconcerting. Of course, concerns about encumbering property that would make alienating said property difficult or disrupt the settled expectations of current owners raise valid concerns, even when the underlying purpose is to address the unjust taking of property.[78] However, the lands at issue in *Hawaii v. Office of Hawaiian Affairs* are unique in light of how these lands came to be owned by the United States and eventually Hawaii.[79] Given the nature of these lands, it is necessary to directly address, instead of marginalize, the unresolved claims to property.

By failing to consider the circumstances surrounding the acquisition of Hawaii, the opinion completely disregards one of the Apology Resolution's main goals, which is to "support reconciliation efforts between the United States and the Native Hawaiian people."[80] At the core of remedying the long-term effects of the overthrow of the monarchy is the need to recognize that colonialism led to the unlawful taking of native Hawaiian lands. The involvement of the U.S. in the colonization of native Hawaiians and its further facilitation of the loss of native lands should compel the federal government to find appropriate resolution for the unjust taking of their

74. *Id*. at 1439.

75. *Id*. at 1442 (quoting *Hous. & Cmty. Dev. Corp. of Haw*., 177 P.3d at 899).

76. *Id*. at 1444–45.

77. *Id*. at 1445.

78. *See* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 179–81 (2000) (discussing the dilemmas presented by reparations in the property context).

79. The Supreme Court had taken a similar, problematic approach of rejecting indigenous ownership of lands—despite the manner by which such lands were acquired—more than one hundred years ago. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588–89 (1823).

80. Apology Resolution, *supra* note 69, at 1513.

lands.[81] However, the *Hawaii v. Office of Hawaiian Affairs* opinion does just the opposite and thus constitutes a tremendous setback in obtaining meaningful compensation for the unlawful taking of native Hawaiians' property, accomplished in large part through blood quantum policies.

IV. POLITICAL AND NONRACIAL USE OF BLOOD QUANTUM LAWS

Part II's examination of the underlying rationale supporting blood quantum rules and Part III's analysis of the specific impact of blood quantum rules on indigenous peoples provide important background to perhaps the more critical question today concerning the use of blood distinctions. As previously noted, the contemporary use of blood quantum in indigenous communities—particularly the Seminole and Cherokee nations—has led to the exclusion of Black Indian freedmen from tribal membership.[82] This racial exclusion has not escaped criticism. Indeed, in *What Blood Won't Tell*, Gross comments, "Perhaps most unfortunate is the fact that so many members of these [exploited] nations have come to equate sovereignty with the right to exclude on the basis of blood quantum."[83]

Given the history and contemporary use of blood quantum rules to discriminate on the basis of race, the criticism in *What Blood Won't Tell* of the deployment of blood distinctions today in some indigenous communities is completely understandable. However, not all blood quantum rules aim to exclude, or have the effect of excluding, on the basis of race. As this part explains, the blood quantum land law in the Commonwealth of the Northern Mariana Islands ("CNMI") illuminates an example of a benign use of blood quantum. Article XII of the CNMI constitution restricts the right to own land in the CNMI to persons of Northern Marianas descent.[84] In doing so, Article XII uses blood quantum to promote an indigenous group's right to property and, as discussed above, does so without excluding on the basis of race. A recent CNMI Supreme Court case, *In re Estate of Tudela*,[85] which recognized the right of a nonindigenous person to own land in the CNMI, underscores Article XII's

81. *See* SINGER, *supra* note 78, at 181 (discussing different forms of reparations to address the unlawful taking of property).

82. *See* GROSS, *supra* note 5, at 169–77.

83. *Id*. at 210.

84. N. MAR. I. CONST. art. XII, *available at* http://cnmilaw.org/constitution_article12.htm.

85. *In re* Estate of Tudela, 2009 MP 9, *available at* http://www.cnmilaw.org/pdf/supreme_court/2009-MP-09.pdf.

nondiscriminatory purpose.

Before further delving into Article XII of the CNMI constitution, it is helpful to briefly revisit the current constitutional framework that the U.S. Supreme Court developed to determine the validity of blood quantum laws.

A. DICHOTOMY BETWEEN THE POLITICAL AND RACIAL PURPOSE OF BLOOD QUANTUM LAWS

The Supreme Court recognized in *Morton v. Mancari*[86] that blood quantum rules that privilege indigenous peoples are constitutional if they promote a political purpose. In holding that a one-fourth American Indian blood quantum hiring preference does not constitute racial discrimination, the Court stressed that the policy furthered American Indians' right to self-determination.[87] *Mancari* thus initiated a political versus racial meaning of blood quantum policies that the Court further clarified in *Rice v. Cayetano*.[88]

In *Rice*, the Supreme Court held that *Mancari* did not apply to blood quantum preferences established for the benefit of native Hawaiians.[89] The Supreme Court held that the Hawaiian constitutional provision allowing only Hawaiians to vote for OHA trustees discriminated based on race and therefore violated the Fifteenth Amendment.[90] The Supreme Court examined the Hawaiian constitution's definition of the term "Hawaiians," which included descendants of persons who were "not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778" and persons who resided in Hawaii in 1778.[91] Rejecting the State's claim that such voting requirements were analogous to the hiring preferences in *Mancari*,[92] the Court stressed that the blood quantum requirement in *Mancari* did not directly preference American Indians as a racial group.[93] Rather, the Court explained, it simply promoted members of federally recognized tribes.[94] The voting requirement in Hawaii, however, constituted discrimination based on ancestry.[95] Critical to the Court's opinion was the fact that *Mancari* blood quantum requirements applied in the context of the

86. Morton v. Mancari, 417 U.S. 535 (1974).
87. *See id*. at 554–55.
88. Rice v. Cayetano, 528 U.S. 495 (2000).
89. *See id*. at 499, 522.
90. *See id*. at 498–99, 522.
91. *See id*. at 499.
92. *See id*. at 518–19.
93. *See id*. at 519–20.
94. *See id*.
95. *See id*. at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

"retained tribal authority" of the American Indians, whose self-governance persisted even after the "cession of their lands to the United States."[96] Notably, the Court was unprepared to consider whether Congress intended for native Hawaiians to have the same independent, self-governing status as organized federal American Indian tribes.[97]

The *Mancari* and *Rice* cases have thus produced two types of identities—racial and political—that appear to be mutually exclusive.[98] Although this framework provides a narrow definition of each category, it offers an initial step for analyzing other blood quantum laws adopted by other indigenous groups. The critical question, as addressed in the context of Article XII of the CNMI constitution, is whether the blood quantum rule in question promotes a political, nonracial, and thereby lawful purpose.

B. ARTICLE XII AS A POLITICAL AND NONRACIAL BLOOD QUANTUM LAW

Article XII of the CNMI constitution limits the right to have "permanent and long-term interests" to persons of Northern Marianas descent ("NMD").[99] It defines NMD, in part, as having "at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood."[100] Article XII's deployment of blood quantum to restrict ownership of CNMI land might be viewed by many as a strange legislative curiosity that exists only in a territory thousands of miles away from any of the fifty states. However, blood quantum land laws are not unique to the CNMI. Similar restrictions have been passed in Alaska, Hawaii, American Samoa, and American Indian tribes for the purpose of protecting indigenous peoples' lands.[101] Because of the *Rice* and *Mancari* dichotomy, this "one-quarter" blood quantum requirement could be argued to effectuate a racial purpose.[102] An examination of the text and legislative history of Article XII, however, demonstrates that its goal was not to discriminate on the

96. *Id*. at 518.

97. *See id*.

98. *See* GROSS, *supra* note 5, at 334 n.49 (explaining that "*Mancari* set the stage for the current dichotomizing between 'racial' and 'political'").

99. N. MAR. I. CONST. art. XII, *available at* http://cnmilaw.org/constitution_article12.htm.

100. *Id*.

101. *See* Villazor, *supra* note 20, at 805–06 (noting various land alienation restrictions based on blood quantum).

102. Article XII has survived an equal protection challenge. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990) (holding that Article XII "is not subject to equal protection attack"). This case, however, was decided before *Rice v*. *Cayetano*. Notably, the Ninth Circuit did not use traditional equal protection analysis but instead applied the territorial incorporation doctrine, which is the analytical framework that courts have used to address constitutional issues in the U.S. territories. *Id*. at 1459–62.

basis of race. Rather, its primary purpose was to prevent the loss of indigenous property.

At the outset, Article XII promoted a political purpose. In fact, its very creation stemmed from a political agreement between the United States and the CNMI.[103] This agreement, documented as section 805 of the Covenant to Establish the Commonwealth of the Northern Mariana Islands, required the CNMI government to regulate the alienation of land in the commonwealth for twenty-five years.[104] Section 805, which became effective in 1986, expressly explained that a land alienation law was necessary "in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands."[105] Additionally, section 805 provided protection "against exploitation" and promoted "economic advancement and self-sufficiency."[106] Article XII, written and adopted by the people of the CNMI,[107] implemented the mandates of section 805.[108]

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103. *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976) [hereinafter Covenant] (creating the Northern Mariana Islands as a U.S. commonwealth). The Covenant was the result of years of political negotiations between the people of the Mariana Islands and the United States. *See* Villazor, *supra* note 20, at 828–31. Among the issues that the Marianas people and the U.S. government discussed was the imposition of land alienation restrictions. *See id*. Notably, both parties agreed that such restrictions were necessary for the development of the new commonwealth. *See id*.

104. In 1986, the Covenant became effective in its entirety, including section 805. *See* Covenant, *supra* note 103, § 805, 90 Stat. at 275. In 2011, twenty-five years after the effective date of section 805, the *mandated* CNMI government regulation of land ownership will end. *See id*. (explaining that after twenty-five years, the CNMI government "may" regulate the alienation of land in the CNMI). The CNMI constitution restricts the ability to vote on amendments to Article XII to persons of NMD. *See* N. MAR. I. CONST. art. XII, § 5, *available at* http://cnmilaw.org/constitution_article12.htm. This voting restriction, which implicates *Rice v*. *Cayetano*, is beyond the scope of this Review. It should be noted that a local advocacy group, Citizens for Change of Article XII, has argued for the repeal of the law because they believe that the law is discriminatory and harmful to the CNMI economy and that overturning it will not lead to the loss of culture. *See* Jose S. Dela Cruz, Citizens for Change of Article XII, The Reasons Why Article 12 Should Be Repealed in 2011 (Sept. 30, 2008), *available at* http://ccart12.com/wp-content/uploads/2009/04/handout2.pdf.

105. *See* Covenant, *supra* note 103, § 805, 90 Stat. at 275.

106. *Id*.

107. The CNMI constitution was drafted by thirty-nine elected delegates who wrote and signed the constitution during a constitutional convention held from October through December 1976. Blaine Rogers, *Raising the Bar: The Commonwealth of the Northern Mariana Islands, the Public Land Trust, and a Heightened Standard of Fiduciary Duty*, ASIAN-PAC. L. & POL'Y J., Summer 2006, at 1, 17. The people of the CNMI approved the constitution on March 6, 1977. DON. A. FARRELL, HISTORY OF THE NORTHERN MARIANA ISLANDS 623 (1991) (noting that 93.3 percent of voters who participated in the election voted in favor of the constitution).

108. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1461 (9th Cir. 1990) (stating that the "legislative history of the Covenant and the [CNMI] Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the restrictions"). Limitations on ownership of indigenous peoples' lands in the Marianas may be traced to similar

Moreover, the text of Article XII demonstrates that it was not intended to preference a particular racial or ethnic group. Instead, Article XII established an entirely new group—persons of Northern Marianas descent—that constituted a subset of the overall Chamorro and Carolinian population residing in the CNMI when it became a commonwealth.[109] Any racial connotation from the use of blood quantum was negated by at least two other definitional parts of Article XII that explained the acquisition of NMD status. First, Article XII included an adoption provision. Article XII confers NMD status on an "adopted child of a person of [NMD] if adopted while under the age of eighteen years."[110] This provision contemplates that a person who is not ethnically Chamorro or Carolinian can nevertheless be considered of NMD as long as the adoption occurred prior to the child turning eighteen years old. Although the actual text of Article XII is silent as to the blood percentage of adopted children, the legislative history states that the "adopted child shall have the same position with respect to Northern Marianas descent as would a natural child."[111] Thus, for example, if a person who is of 50 percent NMD marries someone who is not of NMD, any natural children they might have would be considered to be of 25 percent NMD.[112] If they adopted a child, that child would also be considered to be of 25 percent NMD.[113]

Second, Article XII created a group—"full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian"—through the use of geographic, time, and citizenship restrictions.[114] To begin, Article XII set forth a geographic requirement—a person must have been *born* or have been *domiciled* in the Northern Marianas to be considered of full NMD.[115] This requirement guaranteed that all ethnic Chamorros and Carolinians

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restrictions that the United States imposed when the Mariana Islands were still part of the Trust Territory of the Pacific Islands ("TTPI"). *See* Villazor, *supra* note 20, at 829–30. Under the Trust Territory Code, only those who were TTPI citizens were allowed to own property. *See* 2 Code of the Trust Territory of the Pacific Islands, 57 TTC § 11101 (John Richard Steincipher ed., 3d ed. 1970 & Supp. 1975).

109. *See* N. MAR. I. CONST. art. XII, § 4, *available at* http://cnmilaw.org/constitution_article12.htm.

110. *Id*.

111. ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 176 (1976), *available at* http://www.nmihumanities.org/update/file/Analysis%20of%20NMI%20Constitution,%201976.pdf [hereinafter CNMI CONSTITUTION ANALYSIS].

112. *See id*.

113. *See id*.

114. N. MAR. I. CONST. art. XII, § 4. *Accord* SAMUEL F. MCPHETRES, SELF-GOVERNMENT AND CITIZENSHIP IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS U.S.A. 151–52 (1997) (explaining the tests for determining NMD status under Article XII).

115. N. MAR. I. CONST. art. XII, § 4.

born in the Northern Mariana Islands are recognized as being of NMD as long as they met the other NMD requirements. By the same token, this provision also allowed people who were not ethnically Chamorro or Carolinian, but who were born or resided in the Northern Mariana Islands, to obtain NMD status for purposes of land ownership, provided that they satisfy the other NMD requirements.

Next, Article XII imposed a time limitation—to be of full NMD, a person must have been born or domiciled in the Northern Marianas Islands *as of 1950*.[116] This time restriction ensured that individuals who were born or domiciled in the Northern Mariana Islands as of 1950, but had since left the territory, would still be considered of NMD, provided that all other NMD requirements were met. Conversely, this time restriction prevented individuals who had moved to the Northern Mariana Islands after 1950 from obtaining NMD status, even if they were ethnically Chamorro or Carolinian.

Finally, to be considered of full NMD, one must have been a citizen of the Trust Territory of the Pacific Islands ("TTPI") before the TTPI expired.[117] Practically speaking, this was probably the most difficult NMD requirement to fulfill. TTPI citizenship was acquired by birth or naturalization.[118] However, TTPI citizenship was not conferred on those who acquired another nationality at birth,[119] thus excluding children born both before and after 1950 from obtaining TTPI citizenship.[120] Further restricting TTPI citizenship, the ability to naturalize was only available to individuals who had at least one parent who was born in the TTPI islands.[121] Notably, TTPI citizenship was unavailable to Chamorros and Carolinians who left the Northern Mariana Islands and acquired citizenship elsewhere, such as those who had moved to Guam and became U.S. citizens.[122]

Thus, Article XII created a new group—"full-blooded Northern

116. *Id*.

117. *Id*. With respect to the CNMI, the TTPI expired in 1986. Proclamation No. 5564, 51 Fed. Reg. 40, 399 (Nov. 3, 1986).

118. *See* 2 Code of the Trust Territory of the Pacific Islands, 53 TTC § 2 (John Richard Steincipher ed., 3d ed. 1970 & Supp. 1975).

119. *See* 53 TTC § 1(1).

120. *See* CNMI CONSTITUTION ANALYSIS, *supra* note 111, at 172–74.

121. *See* 53 TTC § 2.

122. *See* MCPHETRES, *supra* note 114, at 153 (explaining that Chamorros who acquired U.S. citizenship while they were on Guam were ineligible for Trust Territory citizenship). Some Chamorros were allowed to return to the Northern Mariana Islands after they resided on Guam to acquire TTPI citizenship. *See id*.

Marianas Chamorro or Northern Marianas Carolinian," comprised of people who are, for land-ownership purposes, distinguishable from ethnic Chamorros or Carolinians. This creation of a completely new category of "full-blooded" Chamorros and Carolinians, which includes even individuals who are not ethnically Chamorro or Carolinian, while excluding those who are, demonstrates that Article XII did not create a racial or ethnic category.

A third provision of Article XII further illustrates its nonracial purpose. As will be discussed in detail below, Article XII enables non-NMD persons to inherit property from their deceased NMD spouses who died without bearing any NMD children. While clarifying the land acquisition rights of non-NMD persons, the CNMI Supreme Court in *In re Estate of Tudela* struck a balance between protecting the right of indigenous peoples to hold on to their lands and the right of nonindigenous persons to enjoy equal protection under the law.

C. *IN RE ESTATE OF TUDELA*

On November 13, 1986, Maria Haruko, an Okinawan woman who had been residing on the island of Saipan for many years, married Santiago Tudela.[123] Five days after they were married, however, Santiago died.[124] Maria subsequently initiated probate proceedings and filed for final distribution of the estate months later.[125] The estate included both personal and real property, which included five separate lots.[126]

Santiago's relatives—his nieces and nephews—eventually challenged Maria's petition for distribution of the real properties to her. They contended that her ownership of the lands would violate Article XII of the CNMI constitution because she was not of NMD.[127] Santiago's relatives claimed that under section 2411 of the CNMI Probate Code, non-NMD persons, like Maria, could only acquire the "maximum allowable legal interest,"[128] which would be a fifty-five-year lease in this case.[129]

The trial court agreed with Santiago's relatives and held that Article

123. *In re* Estate of Tudela, 4 N. Mar. I. 1, 3 (1993).
124. *Id*.
125. *See id*.
126. *See id*.
127. *Id*. at 5 n.16 (citing N. MAR. I. CONST. art. XII, §§ 1, 2, *available at* http://cnmilaw.org/constitution_article12.htm).
128. *Id*. at 5 n.14.
129. N. MAR. I. CONST. art. XII, §§ 3, 4.

XII barred Maria from owning property in the CNMI.[130] On appeal, the CNMI Supreme Court remanded the case to the lower court to determine whether the properties at issue were ancestral lands.[131] Section 2902 of the CNMI Probate Code defines ancestral lands as those properties that an NMD person acquires by inheritance from his or her ancestors.[132] Under the Probate Code, surviving spouses may only obtain a life estate on such lands.[133]

On remand, the trial court held that "[Maria's] non-NMD status was immaterial for purposes of the Commonwealth Constitution's land alienation restrictions."[134] The court explained that Article XII exempted transfers to non-NMD spouses through inheritance when the NMD spouse died without children.[135] Moreover, the trial court held that the lands in question were not ancestral because they were purchased by Santiago and thus not inherited from his ancestors.[136]

The CNMI Supreme Court upheld the trial court's decision, declaring Maria the true owner of the properties.[137] Rejecting the argument that Article XII aimed to "keep land within bloodlines as much as possible,"[138] the CNMI Supreme Court held for the first time that a person who does not possess the requisite blood quantum for Article XII purposes nevertheless can acquire a fee simple interest in land in the CNMI. The court explained that the text of Article XII expressly recognized the right of a non-NMD spouse to own property when the NMD spouse died without issue.[139]

By recognizing the right of persons of non-NMD to own property in the CNMI under certain circumstances, the *Tudela* opinion highlights Article XII's nonracial purpose. Remarkably, the *Tudela* court managed to simultaneously protect the interests of Maria, a person without NMD status, *and* the indigenous NMD population. In particular, the court concluded that Maria's ownership of property would not defeat Article XII's underlying policy of "keeping land within the local population."[140]

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130. *In re Estate of Tudela*, 4 N. Mar. I. at 5.

131. *See id*. at 5–6.

132. *See In re* Estate of Tudela, 2009 MP 9, ¶ 5, *available at* http://www.cnmilaw.org/pdf/supreme_court/2009-MP-09.pdf.

133. *See id*.

134. *Id*. ¶ 4.

135. *See id*. ¶ 5.

136. *See id*. ¶¶ 23–25 (summarizing the trial court's decision regarding the ancestral issue).

137. *See id*. ¶ 25.

138. *Id*. ¶ 14.

139. *Id*. ¶ 19 (stating that the "plain text of Article XII" provides the answer).

140. *Id*. ¶ 21 (noting that "the exemption found in Article XII, Section 2 does not permit the alienation of a fee simple estate beyond the one-time exception to the surviving spouse through

Crucial to its decision, the court reasoned that Maria's ownership would only temporarily remove the properties from the control of people of NMD. Eventually, the court explained, the land would revert to a person of NMD because restrictions on land sales imposed on people of NMD would also apply to Maria. That is, Maria may only "convey her fee simple interest to an NMD."[141]

The *Tudela* case and the particular provisions of Article XII discussed above demonstrate Article XII's nonracial purpose. Article XII implemented the shared desire of both the United States and the indigenous NMD population to temporarily restrict land ownership rights during the early political and economic development of the CNMI. By doing so, indigenous people have been able to maintain control over their lands.[142] Further, Article XII demonstrates that unlike the other examples cited in *What Blood Won't Tell*, blood quantum rules are not necessarily racially discriminatory, nor do they always work to subordinate native populations. Rather, when used correctly and cautiously, blood quantum rules can actually promote the indigenous peoples' sovereignty and right to self-determination.

V. CONCLUSION

What Blood Won't Tell's detailed examination of the role that rules concerning blood differences played historically in subordinating people of color, including indigenous peoples, serves as a reminder of the arbitrariness of the legal construction of race. It also informs us of the ongoing effects of this historical racialization and the need to adopt policies that will help to overcome such consequences. Moreover, *What Blood Won't Tell* cautions against relying on blood quantum rules to promote indigenous peoples' sovereignty. At minimum, *What Blood Won't Tell* encourages us to be attentive to the underlying purpose of a particular blood quantum rule to ensure that it is promoting a political and nonracial goal. More broadly, *What Blood Won't Tell* calls for reconsideration of a more fundamental proposition—that blood quantum may be equated with the right to exclude in exercising sovereignty.

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inheritance").

141. *Id*.

142. Whether or not Article XII actually achieved its stated specific goals, including the preservation of culture and promotion of economic development, is a separate question that will be explored in future scholarship. One issue that requires further scrutiny is whether the use of land alienation restrictions to preserve culture conflicts with the equally important purpose of promoting economic development.

Perhaps most importantly, *What Blood Won't Tell* alerts us to the need to revisit the apparent race-versus-politics dichotomy established by *Rice* and *Mancari*. The exclusion of the Black Indian freedmen from the Cherokee and Seminole nations illustrates the use of a blood quantum law that is both racial and political. The race-versus-politics binary does not address this dual deployment of blood quantum law. When the lines between the two identities have blurred, what should be law's response? By highlighting the complexity of blood quantum rules, *What Blood Won't Tell* shows us that much about the way law addresses the legacy of racialization remains unsettled. Understanding that there is much work to be done is an important step toward finding resolution of the effects of racism and colonialism.